

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 407 OF 2012

FANIKIWA LIMITED.....PLAINTIFF

VERSUS

JOSEPH KOMEN.....1ST DEFENDANT

SAMMY CHERASTE.....2ND DEFENDANT

CRISPUS KIPKECH LABAT.....3RD DEFENDANT

JOSEPH KOECH.....4TH DEFENDANT

BOAZ CHERONO.....5TH DEFENDANT

ARAP KOECH.....6TH DEFENDANT

JUDGMENT

Fanikiwa Limited, a Limited Liability Company duly incorporated in Kenya as such under the provisions of the Companies Act, Cap. 486, Laws of Kenya (*hereinafter referred to as the plaintiff*) has come to court against the defendants claiming that the he is the registered owner of all that parcel of land known as Soy/Kipsomba/Block 12/30 having purchased the same from Lonrho Agribusiness E. A. Limited on or about the year, 2001. The Plaintiff however states that on or about December, 2002, the defendants without any colour of right and/or lawful justification illegally trespassed onto and invaded the plaintiff's aforementioned land and occupied the entire land while committing acts of waste. The Plaintiff avers that the Defendants sub-divided and occupied the said parcel of land in the following ratio: -

- | | | |
|----------------------------|---|----------|
| (a) Crispus Kipkoech Labat | - | 10 Acres |
| (b) Joseph Komen | | 20 Acres |
| (c) Boaz Cherono | | 20 Acres |
| (d) Sammy Cheraste | | 20 Acres |
| (e) Joseph Komen | | 20 Acres |
| (f) Arap Koech | | 10 Acres |

The Plaintiff further avers that due to the Defendants acts as aforementioned, the plaintiff has been denied access to and use of the parcel of land while the defendants continue to commit acts of wanton destruction thereon. The Plaintiff's prayer therefore is for an order of eviction to issue as against the Defendants both jointly and severally to forthwith vacate the plaintiff's parcel of land. The Plaintiff further prays for an order of permanent injunction thereafter barring the Defendants from trespassing onto, invading, cultivating, occupying and/or otherwise dealing with the land parcel number Soy/Kipsomba/B1ock 12/30.

The Plaintiff avers that demand and notice of intention to sue has been issued to the Defendants in vain hence necessitating this suit.

The defendants filed a joint statement of defence whose gist is that they are the owners of land parcel known as Soy/Kipsomba/Block 12/30 having exchanged their land in Sacho for the suit land at the request of the retired President H. E. Daniel Toroitich Arap Moi. The Defendants state that they were settled on the suit land sometimes in the year 2000 upon the abovementioned exchange of land and that they have since been in occupation of the suit land. They cannot be said to be and they indeed are not trespassers. The defendants believe that division of the land is justified as the land does indeed belong to them and they are and have been in possession of their various portions. The Defendants state that they are and always have been in possession of the suit property and the Plaintiff cannot claim that it has been denied access. The land does not belong to the plaintiff and that the plaintiff has never been in its possession. The defendants state that being the rightful owners of the land and having been in its possession for over 10 years now the plaintiff's claim cannot stand.

The Defendants further state that the Plaintiffs' Director Mark Too fraudulently caused the title to be issued in its name. The said Director had been charged with the task of settling the Defendant and processing the titles for them but instead of doing so, he went against the instructions and processed the title in favour of the plaintiff. That in light of the foregoing, the defendants aver that the plaintiff's title is tainted with fraud and the same should be cancelled and a new one issued in their favour.

When the matter came for hearing of the plaintiff's case, **PW1, Mr. Mark Too the Director** of the Company testified that he is a farmer and a Director of the plaintiff. The plaintiff purchased the land through an advocate known as David & Raffman. He bought three parcels of land for which has the title numbers. They are Soi/Kipsomba/12/30. The other land is Soi/Soi Block 10 Navillus 3. The other one is Soi/Block 10 Navillus/8. His lawyers received communication from EATEC about the parcels of land. The purchase price was 27,999,757 which the plaintiff was to pay through David and Raffman. He paid a deposit of Kshs. 25,000,000 through David Raffman vide Cheque number 0001850. A receipt was issued thus receipt No. 0406 dated 22.9.1999. The land was finally transferred to the plaintiff and that he has the original title deed issued on 8.2.2001. The initial owner as per the green card was Government of Kenya, Lonhro Agribusiness and finally Fanikiwa (K) Limited. The current owner is Fanikiwa Ltd. There was dispute in Navillus Block 10/3. There was no dispute in Block 10/8. The dispute in 10/3 was between Fanikiwa and Jonathan Moi. He did take possession of the land. The defendants later on invaded the suit land which is now occupied by the defendants. He did not transfer the land to retired President Daniel Toroitich Arap Moi. The transfer of land in the defendants' list of documents was signed by himself in respect of Cherengani/Nzoia/Block 1/Perkera/47. He did not sign any transfer for Soi/Kipsomba/30. He does not know who filed the documents. The search was done on 10.3.2015. The land was under his name Mark Tanpei Too. He produced a copy of the title as P.Ex.8. the certificate of search was produced as P.Ex.7. The land in question does not belong to the retired President. The retired President has never owned the land. He prays that the person occupying the land to move out. If they refuse, he prays for an eviction order. He prays for injunction. He also prays for costs.

PW2, Moses Kirui the Land Registrar Uasin Gishu states that he is the custodian of all land records and that the title deed in respect of Kipsomba/Block 12/30 matter was issued to the plaintiff thus Fanikiwa Ltd. The land registrar produced the original green card showing that the title was issued on 8th February 2001 and a presentation book showing a transfer in favor of Fanikiwa Ltd from Lonrhor Agribusiness. The Registrar states that there is no evidence of transfer to someone else. On cross examination by the counsel for the defendants, he states that he is familiar with the records in respect of the Suitland and that according to the green card the property was charged to Agricultural Finance corporation for a loan of Kshs.3,300,000 on 4th June 2004 and a loan of Kshs.1,000,000 on 30th September 2004. He is not aware of any discharge of charge and that he would not be surprised if there was a discharge of charge because sometimes they are not registered. However, he would be surprised if there were other titles in respect of the property. In essence, he states that the title issued to the former president was not supported by any transaction and that the transfer from Fanikiwa Ltd to the former president was not legally done.

DW1 was Boaz Kipto Cherotich sworn states that he is a civil servant and works in Vihiga as County

Commissioner. He knows the property in dispute as Kipsomba/Block 12/30. The land is a total of 100 acres and is being occupied by all of the defendants who are 9 in number. The land has been subdivided into 9 parcels according to DW1. He produced a map certified by the District Surveyor, Uasin Gishu. He does not know when the survey was done. His parcel number is either No. 70 or 69 as per his statement. He entered the land in the year 2000. They were approached by the second President of Kenya to surrender their parcels of land in Baringo to be allocated land in Uasin Gishu County. They accepted the offer and surrendered their title deeds. They were shown the suit land in Uasin Gishu and moved in and started settling. He knew Mark Too but states that the land does not belong to him. They do not know how the land was registered in the name of Fanikiwa Limited as Fanikiwa has never been on the land. The real defendants are the ones mentioned in the statement. He does not know why Mark Too left out others. Those who were left out are:

1. ***Hellen Sote Cheraste***
2. ***William Chemitei Kebut***
3. ***Emily Kobilo***
4. ***Boaz Cherutich***
5. ***Joel Komen***
6. ***Crispus Kiplagat***
7. ***Francis Samoei***
8. ***Silas K. Kipkulei***

The evidence of ***DW2, DW3, DW4, DW5, DW6, AND DW7*** reiterates the evidence of DW1 wherein they state that they have made permanent structures, livestock and have been farming on the suit land. They have planted maize and do not have land elsewhere. They are victims of circumstances. The process of settling them on the land was by the Ministry of Lands. Hon. Sang, Minister who was Commissioner of Lands settled them on the land. They do not know Mark Too came into the picture. They were shown the land by agents of the former President and started occupying the same. They cannot move out because they have been on the land for over 12 years.

The **plaintiff submits** that he was registered proprietor of the suit property on 8th February 2001 and therefore he is protected by the law. The plaintiff further submits that there is no evidence that the property was fraudulently acquired. The plaintiff submits that he is entitled to order of eviction. under section 26(1) of the Land Registration Act, the title of a registered proprietor is prima facie evidence that the proprietor is the absolute and indefeasible owner of the land subject to any encumbrances, easements restrictions and conditions contained or endorsed in the certificate. **The defendants on the other hand submits** that they exchanged the suit land with the former president Daniel Toroitich Arap Moi and have been in possession of the suit land for more than 12 years. Moreover, that the suit land was fraudulently registered in the plaintiff's name.

I have considered the pleadings and evidence on record and do find that the plaintiff has proved on a balance of probability that he is the registered proprietor of the parcel of land. The green card shows that the register was opened on the 2nd day of December 1997 as Soy/ Kipsomba/block12 (Kipsomba) parcel no 30 of approximate area measuring 40.47 Ha. and registered in the name of the government of Kenya. On the 8th February 2001, the land was registered in the names of Lonrho Agribusiness East Africa Ltd and transferred to the Fanikiwa Ltd on the same date and title deed issued. There is no other transaction after the 8th February 2001. The defendants' alleged transactions are not supported by any entry in the register. I do agree with counsel for the plaintiff that under section 26(1) of the Land Registration Act, the title of a registered proprietor is prima facie evidence that the proprietor is the absolute and

indefeasible owner of the land subject to any encumbrances, easements restrictions and conditions contained or endorsed in the certificate. Section 26(1) of the Land Registration Act states: -

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except: -

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

The plaintiff asserts that Lonrho Agribusiness as the 1st registered owner rightly and properly transferred the suit property to the Plaintiff who is now the registered owner and who have absolute rights of ownership and its rights and interest are in terms of Section 25 (I) of the Land Registration Act No. 3 of 2012 is indefeasible. Section 25(1) of the Land Registration Act provides as follows: -

Subject to this Act-

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

That the law protects the Plaintiff title as was held by the Court of Appeal at page 8 of its judgment in **Jaj Super Power Cash and Carry Ltd vs Nairobi City Council & Others CA Civil Appeal No. 11 of 2002 (Nrb) (unreported)**, as follows;

"It would be a violent affront to our land tenure systems, with all their perceived imperfections, unless there is a lawful challenge to an existing title or a policy — charge by parliament, to uphold the rights of a temporary allottee of land or trespasser, over those of a registered proprietor."

This court has recognized and held in the past that any person found to have trespassed on another person's land is liable for eviction as long as the latter's title was legally and lawfully obtained as the Constitution of Kenya 2010 does not protect illegally acquired land. **Article 40 of the Constitution** provides that:

(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property-

(a) of any description; and

(b) in any part of Kenya.

(2) ...

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

(5)

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired."

Looking at the evidence before this Honorable Court, one can only conclude that the Plaintiff is the lawful and legal registered owner and as the rightful owner of the suit property and the Defendant has no valid claim against the property. The case of **Kibusia Arap Konga vs Evans Obonyo Obiero & Another (2017) eKLR**, is relevant as this Honourable Court rendered itself thus: -

“Sections 24, 25 and 26 of the Land Registration Act no 3 of 2012 envisages the vesting of absolute ownership of land to the person in whose name the property is registered together with all rights and privileges appurtenant thereto and that the rights of a proprietor should be protected as evidenced by the certificate of title unless acquired fraudulently or illegally.”

The Court did proceed to state: -

...the plaintiff is entitled to succeed as the suit land is registered in the plaintiff's name and therefore he is entitled to vacant possession,

Therefore, the court made a declaration that land parcel known as TURBO EAST/LESERU BLOCK 2 (AINAPNGETIK) 44, measuring 3.85 Ha belonged to the plaintiff and that the defendant was ordered to give vacant possession and granted a permanent injunction restraining the defendant, his servants, agents and/or assigns from in any way dealing and/or interfering with the Plaintiff's quiet possession, use and/or enjoyment and to stop unlawfully threatening to alienate, constructing, dealing, selling and/or illegally transferring TURBO EAST/LESERU BLOCK 2 (AINAPNGETIK) 44 measuring 3.85 Ha. Lastly, he does grant costs of this suit and interest thereof at court rates to the plaintiff.

Back to the suit herein, In support of its case, the Plaintiff did produce a Certificate of Title to **SOY/KIPSOMBA/BLOCK 12/30**, Receipts by and in favour of Lonrho Agribusiness and acknowledgments, transfer forms, presentation books, Green Card and order in ELDORET HCC No. 18 of 2008 which established that the suit premises were purchased lawfully and legally by the Plaintiff and they pray that the Court does find it so. Where one intends to impeach the title on the basis that the title has been procured by fraud or misrepresentation or forgery, then the Defendants ought to prove that the title holder was a party to the fraud, forgery or misrepresentation. The law has placed, rightly so, the burden upon the Defendants to establish, demonstrate and prove that the title holder is guilty of immoral conduct, guilty of acquiring title un-procedurally, fraudulently, illegally and through a corrupt scheme. The plaintiff contends that the Defendants have failed to establish these assertions and or even establish the grounds set out in Section 80 of the Land Registration Act, which states: -

(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or

default.

The Plaintiff submits, and I do agree, that his title can only be challenged on the limited grounds set out in Section 26(1) (a) & (b) of the Land Registration Act that is fraud or misrepresentation and/or if it is proven by the Defendants that the title has been acquired through a corrupt scheme and proved in terms of Section 80 of the Land Registration Act. The plaintiff submits, and I do agree, that the defendants have not established any fraud and/or illegality to which the Plaintiff was a party. The documentation tendered by the Plaintiff has shown that it acquired the suit property procedurally until it was registered as the owner. This court finds that there is no iota of evidence that title was procured fraudulently.

The alleged exchange of land between the defendants and the former president Daniel Toroitich Arap Moi is void ab initio as there was no consent of the land control board. It is not disputed that the suit land is agricultural land which is subject to the provisions of the Land Control Act, CAP 302, Laws of Kenya. The Land Control Act, requires that the consent of the Land Control Board be granted before any transaction touching on agricultural land can be completed. Such consent is required to be issued within a period of 6 months of the agreement according to the provisions of Section 6 of the Land Control Act. The effect of failure to obtain the consent of the Land Control Act, is that the transaction is declared null and void. The act provides that; -

6. (1) Each of the following transactions -

a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 for the time being apply;

c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area,

is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

The plaintiff is the registered owner of the suit land and therefore has an indefeasible right over the property. The plaintiff's rights as proprietor of the land is clearly protected in law and the defendant has no reason to trespass thereon and the law allows the Defendants to challenge the plaintiffs' ownership on grounds of illegality, unprocedural acquisition or corrupt scheme. The defendants have not proved that the plaintiff obtained title to the property unprocedurally or illegally. The issue of adverse possession does not arise as the defendants had barely occupied the suit land for a period of 11 years when the suit was filed.

I do find that the Plaintiff has proved his case on a balance of probabilities to be the absolute proprietor of the suit land therefore entitled to rights and privileges that appurtenant thereto. The plaintiff having proved to be absolute proprietor, is entitled to the orders sought in the plaint. I do grant judgment in terms that the defendants be evicted from the Suitland upon being issued 30 days' notice and that there be a permanent injunction barring the defendants from trespassing onto, invading, cultivating, occupying and or otherwise dealing with the land parcel no soy Kipsomba Block12/30. Costs of the suit to the plaintiff. Orders accordingly.

Dated and delivered at Eldoret this 23rd day of November, 2017.

A. OMBWAYO

JUDGE